

1                                   **WAGANAKISING ODAWAK STATUTE**  
2   **CONTRACTS**

3  
4   **SECTION I.               SHORT TITLE**

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6               This statute may be cited as the “Contracts Statute.”  
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9   **SECTION II.            PURPOSE**

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11           The purpose of this Statute is to set forth the Tribe’s jurisdiction and sovereign rights  
12 over contract matters and to set forth contractual rights between parties.  
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14

15   **SECTION III.         DEFINITIONS**

16  
17   **A.       “Acceptance”** means a communication made by the offeree to the offeror agreeing to the  
18 content of the offer that manifests intent to enter into a contract.  
19

20   **B.       “Consideration”** means some form of legal detriment that reflects a bargained-for-  
21 exchange between the parties to a contract.  
22

23   **C.       “Contract”** means a promise or set of promises, the breach or performance of which  
24 gives rise to a legally recognized duty.  
25

26   **D.       “Court”** means the courts of the Little Traverse Bay Bands of Odawa Indians.  
27

28   **E.       “Divisible Contract”** means a contract where the performance of each party is divided  
29 into two or more parts.  
30

31   **F.       “Merchant”** means a person who regularly deals in goods of the kind.  
32

33   **G.       “Minor”** means a person under the age of 18 years.  
34

1 **H. “Offer”** means a communication made by an offeror to an offeree that manifests intent to  
2 enter into a contract.

3 **I. “Offeree”** means the person to whom an offer is made.  
4

5 **J. “Offeror”** means the person who makes an offer.  
6

7 **K. “Promisee”** means the person to whom a promise is made.  
8

9 **L. “Promisor”** means the person who makes a promise.  
10

11 **M. “Signature”** means some symbol, mark or other writing whether by hand or by  
12 electronic means is intended by the signor to serve as his or her signature.  
13

14 **N. “Tender”** means the present willingness and ability to perform.  
15

16 **O. “Territorial Jurisdiction of the Little Traverse Bay Bands of Odawa Indians”** means  
17 “areas referenced in Public Law 103-324, 25 USC Section 1300k-2(b)(2)(A) as the boundaries of  
18 *the reservations for the Little Traverse Bay Bands as set out in Article I, paragraphs ‘third and*  
19 *fourth’ of the Treaty of 1855, 11 Stat. 621.” Little Traverse Bay Bands Constitution, Article*  
20 *V(A)(1)(a).*  
21

22 **P. “Tribal Citizen”** means an enrolled member of the Little Traverse Bay Bands of Odawa  
23 Indians.  
24

25 **Q. “Tribal Court”** means the Little Traverse Bay Bands of Odawa Indians Tribal Court.  
26

27 **R. “Tribe”** means the Little Traverse Bay Bands of Odawa Indians.  
28

29 **S. “Writing”** means some document that identifies the material terms of a contract. A  
30 writing can be in any form tangible or electronic.  
31

## 32 **SECTION IV. JURISDICTION** 33 34

1           The Tribe's jurisdiction under this statute extends to all contracts to which the Tribe is a  
2 party, both parties are tribal citizens, or at least one party to the contract is a tribal citizen and the  
3 contract is entered into within the territorial jurisdiction of the Tribe.  
4  
5

## 6       **SECTION V.           STATUTE OF LIMITATIONS**

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8           An action for breach of contract must be brought within four years of the breach,  
9 otherwise the action is barred.  
10  
11

## 12       **SECTION VI.          CONTRACT FORMATION**

13

14       **A.     In General.** To form a valid contract there must be an offer, an acceptance, and valid  
15 consideration given.  
16

17           **1.     Offer.** An offer creates a power of acceptance in the offeree and a corresponding  
18 liability on the part of the offeror.  
19

20                   **a.**     For a communication to be an offer, it must contain a promise,  
21 undertaking, or commitment to enter into a contract that shows the offeror's intent  
22 to contract.  
23

24                   **b.**     The offer must be definite and certain as to the identity of the offeree, the  
25 subject matter of the offer, and the price to be paid.  
26

27           **2.     Acceptance.** An acceptance is a manifestation of assent to the terms of the offer,  
28 through which the offeree exercises the power given by the offeror to create a contract.  
29

30       **B.     Bilateral Contract.** A bilateral contract is formed by a mutual exchange of promises, in  
31 which each party is both a promisor and a promisee.  
32

33       **C.     Unilateral Contract.** A unilateral contract is formed only upon the offeror requesting  
34 performance, rather than a promise, and full performance by the offeree.

1  
2 **D. Definiteness of Subject Matter.** The subject matter of a contract must be reasonably  
3 certain such that the promise is identifiable.  
4

5 1. A contract involving the sale of real estate must identify the land, the price to be  
6 paid, and the parties to the contract.  
7

8 2. A contract involving the sale of goods must contain the quantity. It is sufficient if  
9 a contract calls for one party to supply all that the party produce or all that the other party  
10 requires, so long as the quantity is capable of being determined.  
11

12 3. A missing contract term does not prevent formation of the contract if it appears  
13 under the facts and circumstances that the parties intended to make a contract, and there  
14 is a reasonably certain basis for giving a remedy. The Court may supply reasonable terms  
15 for those that are missing.  
16

17 a. If the missing term is price, the Court must use the fair market value or the  
18 value currently used in the geographical area and industry involved to determine a  
19 reasonable price.  
20

21 b. For any other missing term in a contract, the Court should look base its  
22 determination on the course of dealing between the parties, course of performance  
23 between the parties, or industry practice.  
24

25 **E. Terminating an Offer.** The power of acceptance created by an offer ends when the offer  
26 is terminated by revocation, rejection, or by operation of law.  
27

28 1. **Revocation.** An offeror may revoke his or her offer at any time before the offeree  
29 accepts. The offeror's revocation may be communicated to the offeree either directly or  
30 indirectly. Indirect communication of the revocation occurs when the offeree receives  
31 correct information from a reliable source of act of the offeror that would indicate to a  
32 reasonable person that the offeror no longer wishes to make the offer.  
33

1           **a.**       A revocation by the offeror is effective when it is received by the offeree.  
2           The revocation need not be actually read by the offeree. It is sufficient if the  
3           revocation is received at the offeree's place of business, home, or otherwise  
4           comes to the offeree's attention.

5  
6           **b.       Exceptions.** An offeror's power to revoke his or her offer is limited in the  
7           following situations:

8  
9                   **i.       Option Contract.** An offeror may not revoke an offer in which the  
10                  offeree gives consideration for a promise by the offeror not to revoke.

11  
12                  **ii.       Detrimental Reliance.** Where the offeror could reasonably expect  
13                  that the offeree would rely to his or her detriment on the offer; and the  
14                  offeree does so rely, the offer will be held irrevocable as an option  
15                  contract for a reasonable length of time.

16  
17                  **iii.       Part Performance of Unilateral Contract.** An offer for a  
18                  unilateral contract becomes irrevocable once performance has begun.  
19                  Once the offeree has begun performance, he or she has a reasonable time  
20                  to complete performance, during which time the offer remains irrevocable.

21  
22           **2.       Rejection.** An offeree may terminate an offer by an express rejection or a  
23           counteroffer.

24  
25                   **a.**       An express rejection is a statement by the offeree that he or she does not  
26                  intend to accept the offer; and such statement will terminate the offer.

27  
28                   **b.**       A counteroffer is an offer made by the offeree to the offeror that contains  
29                  the same subject matter as the original offer, but differs in its terms. A  
30                  counteroffer serves both as a rejection of the original offer and as a new offer.

31  
32                   **c.**       A rejection is effective when it is received by the offeror.  
33

1           **d.**     If an offer is rejected, the offeror may restate the same offer and create a  
2           new power of acceptance.  
3

4           **3.     Termination by Operation of Law.**  
5

6           **a.**     If either of the parties dies or is adjudicated insane prior to acceptance, the  
7           offer is terminated. It is not necessary that the death or insanity be communicated  
8           to the other party. However, if the rules limiting an offeror's power to terminate  
9           are applicable (option contract, detrimental reliance, or part performance), death  
10          or insanity will not terminate the offer.  
11

12          **b.**     If the subject matter of the contract is destroyed, the offer is terminated.  
13

14          **c.**     If the subject matter of the contract becomes illegal, the offer is  
15          terminated.  
16

17 **F.     Acceptance of an Offer.** For an offer to be accepted, the offeree must know of the offer  
18 and unequivocally accept the offer in the manner requested or by other reasonable means.  
19

20          **1.**     An acceptance is effective at the moment it is received by the offeror personally  
21          or at his usual place of business. Except if the acceptance is by mail or similar means, it is  
22          effective at the moment of dispatch so long as the mail is properly addressed and  
23          stamped.  
24

25          **2.**     Any additional or different terms in the response will not constitute an  
26          acceptance, and will be a rejection and a counteroffer.  
27

28 **G.     Consideration.** To have valid consideration the promisee must suffer some legal  
29 detriment, the detriment must induce the promise, and the promise must induce the  
30 detriment.  
31

32  
33 **SECTION VII.     DETERMINING THE TERMS OF A CONTRACT**  
34

1   **A.    General Rules of Construction.**

2  
3       **1.**       Contracts must be construed as a whole. Specific clauses will be subordinated to  
4       the contract's general intent.

5  
6       **2.**       Words must be construed according to their ordinary meaning, unless it is clearly  
7       shown that they were meant to be used in a technical sense.

8  
9       **3.**       If provisions within the contract appear to be inconsistent, written or typed  
10      provisions will prevail over hand written provisions.

11  
12      **4.**       Ambiguities in a contract are construed against the party preparing the contract,  
13      absent evidence of the intention of the parties.

14  
15   **B.    Parol Evidence.**

16  
17      **1.       Parol Evidence Rule.** Where parties have agreed to a written contract as the final  
18      expression of their agreement, a prior written or oral agreement, or a contemporaneous  
19      oral agreement, cannot be used to vary the terms of the agreement.

20  
21          **a.**       To determine whether the parties intended the writing as the final  
22          expression of their agreement, the Court must consider all of the specific  
23          circumstances of the transaction involved, and consider whether similarly situated  
24          parties would naturally and normally include the matter sought to be introduced  
25          into their writing.

26  
27          **b.**       Extrinsic evidence may be admitted where it does not seek to vary,  
28          contradict, or otherwise include contrary terms to the written agreement. The  
29          following may be admitted as extrinsic evidence:

30  
31              **i.**       where a party asserts that the agreement, although accurately  
32              reflected in the writing, never came into being because of a formation  
33              defect or a condition precedent; or

1                   ii.       where the evidence concerns a collateral matter that is of the type  
2                   that would naturally be omitted from the written agreement and does not  
3                   conflict with the written integration.  
4

5   **C.     Modification of Contract Terms.**  
6

7       1.       A final contract cannot be modified unless the modification is supported by new  
8       consideration.  
9

10      2.       A written contract may be modified orally. However, if a contract, as modified,  
11      falls within the statute of frauds, it must be in writing.  
12  
13

14   **SECTION VIII.       PERFORMANCE OF A CONTRACT**  
15

16   **A.     In General.** A party's basic duty is to substantially perform all that is called for in the  
17   contract.  
18

19   **B.     Conditions.** A contract may provide that a party does not have a duty to perform unless  
20   some condition is fulfilled.  
21

22      1.       The classification of the condition will determine when a party's duty to perform  
23      is triggered. There are three classifications of conditions:  
24

25          a.       A condition precedent is a condition that must occur before an absolute  
26          duty of immediate performance arises in the other party.  
27

28          b.       Conditions concurrent are those that are capable of occurring together, and  
29          the parties are bound to perform at the same time.  
30

31          c.       A condition subsequent is a condition, the occurrence of which, cuts off an  
32          already existing duty of performance.  
33



1       **2. Express Conditions.** An express condition is an explicit contractual provision  
2 that provides that either a party does not have a duty to perform unless some even occurs  
3 or fails to occur; or if some event occurs or fails to occur, the obligation of a party to  
4 perform one or more of his duties under the contract is suspended or terminated.  
5

6           **a.** Where an express condition provides that a party will pay or perform only  
7 if satisfied with the other party's performance, the promisor is not under a duty to  
8 pay unless he or she is satisfied.  
9

10           **i.** If the subject matter of the contract involves mechanical fitness,  
11 utility or marketability, the condition of satisfaction is fulfilled by a  
12 performance that would satisfy a reasonable person.  
13

14           **ii.** If the subject matter of the contract involves personal taste or  
15 personal judgment, a condition of satisfaction is fulfilled only if the  
16 promisor is personally satisfied. However, the promisor's dissatisfaction  
17 must be given honestly and in good faith.  
18

19           **iii.** In construction contracts where the condition is based on the  
20 satisfaction of a third party, that person must be actually satisfied, but is  
21 required to act honestly and in good faith.  
22

23       **3. Implied Conditions.** An implied condition exists in a contract that although does  
24 not explicitly state the condition, there exists some relevant event that must occur before  
25 the performance of one or both parties come due.  
26

27           **a.** There may be an implied condition of performance that the duty of each  
28 party to render performance is conditions on the other party either rendering his  
29 performance or making a tender of his performance.  
30

31           **b.** There is an implied condition of cooperation; the obligation of one party to  
32 render performance is impliedly conditioned on the other party's cooperation in  
33 that performance.  
34

1       **4. Order of Performance.** If the contract is unclear as to who is to render  
2 performance first, the following rules apply.  
3

4           **a.** If both performances can be rendered at the same time, they are impliedly  
5 concurrent. Therefore, absent a valid legal excuse, each party must first tender his  
6 own performance if he or she wishes to put the other under a duty of immediate  
7 performance resulting in breach if he fails to perform.  
8

9           **b.** If one party's performance requires an extensive period of time to  
10 complete and the other party only has a duty to pay or to complete another act that  
11 takes minimal time, the party whose performance is going to take the longest,  
12 must perform first.  
13

14 **C. Excuse of Conditions.**  
15

16       **1.** If a party having a duty of performance that is subject to a condition prevents the  
17 condition from occurring, the condition is excused if such prevention is wrongful.  
18

19       **2.** An actual breach of the contract when performance is due will excuse the duty of  
20 counter-performance if the breach is material.  
21

22       **3.** A condition may be excused if there is a prospective inability or unwillingness to  
23 perform by one party. This occurs when a party has reasonable grounds to believe that the  
24 other party will be unable or unwilling to perform when performance is due. The  
25 innocent party may suspend his or her own performance until he she receives adequate  
26 assurances that performance will be forthcoming. If no assurances are received, the  
27 innocent party may treat this failure to provide assurances as a breach, and the innocent  
28 party will be excused.  
29

30       **4.** The condition of complete performance may be excused if the party has rendered  
31 substantial performance and the breach was not made in bad faith. This is only applicable  
32 in the case of an implied condition.  
33

1       **5.**       In the case of a divisible contract, where a party performs one unit of the contract,  
2       he or she is entitled to the agreed-on equivalent for that unit even if he or she fails to  
3       perform the other units.

4  
5       **6.**       A condition may be excused when a party indicates that he or she is waiving a  
6       condition before it is to happen, or waiving some performance before it is to be rendered,  
7       and the person addressed detrimentally relies on the waiver.

8  
9       **D.     Discharging Contractual Duties.** A party's duties under a contract may be discharged  
10      under the following circumstances.

11  
12      **1.     Performance.** A full and complete performance under the contract discharges a  
13      party's duties under the contract.

14  
15      **2.     Tender.** A good faith tender of performance made in accordance with contractual  
16      terms discharges a party's duties under the contract.

17  
18      **3.     Occurrence of Condition Subsequent.** An occurrence of a condition subsequent  
19      discharges a party's duties under the contract.

20  
21      **4.     Illegality.** If the subject matter of the contract becomes illegal due to a  
22      subsequently enacted law or other governmental act the party's duties under the contract  
23      are discharged.

24  
25      **5.     Impossibility.** The occurrence of an unanticipated or extraordinary event that  
26      makes performing the contract impossible may discharge the party's duties if such duties  
27      are objectively impossible to perform.

28  
29          **a.**       The impossibility must be objective, meaning that the duties could not be  
30          performed by anyone.

31  
32          **b.**       If the performance to be rendered under the contract becomes only  
33          partially impossible, the duty may be discharged only to that extent.

1           c.       The death or physical incapacity of a party will not render the contract  
2 impossible, unless the party who is now deceased or incapacitated was a person  
3 necessary to effectuate the contract.  
4

5       **6.     Frustration.** The occurrence of a supervening act or event that frustrates the  
6 purpose of the contract may discharge duties under the contract. Frustration exists if the  
7 purpose of the contract becomes valueless and the supervening act was not the fault of  
8 the party seeking the discharge.  
9

10       **7.     Rescission.** A mutual rescission of the contract by the parties by express  
11 agreement and including consideration will discharge the duties of each.  
12

13           a.       A rescission may be made orally, unless the contract is within the statute  
14 of frauds.  
15

16           b.       Unilateral rescission may only be granted if the party seeking the  
17 rescission has adequate legal grounds, including claims of mistake,  
18 misrepresentation, duress, or failure of consideration.  
19

20       **8.     Novation.** A valid novation will serve to discharge the old contract, if the  
21 following requirements are met:  
22

23           a.       a previous valid contract exists; and  
24

25           b.       all the parties are in agreement as to the new contract;  
26

27       **9.     Partial Modification.** If the parties subsequently modify part of the contract, the  
28 modification serves to discharge those terms of the original contract that are subject to the  
29 modification. However, it will not serve to discharge the entire contract. To receive a  
30 partial discharge by modification, the following must be met:  
31

32           a.       the modifying agreement must have been mutually assented to; and  
33

1           **b.**       there must be consideration for the modification, however it is sufficient  
2           consideration that each party limits his or her rights to enforce the original  
3           contract as is;  
4

5           **10. Accord and Satisfaction.** An accord is an agreement where one party to an  
6           existing contract agrees to accept, in lieu of the performance that he or she is supposed to  
7           receive from the other party to the existing contract, some other, different performance.  
8           The satisfaction is the performance of the accord agreement; and will discharge the duties  
9           under both contracts.  
10

11          **11. Lapse.** Where the duty of each party is a condition concurrent to the other's duty,  
12          if on the set day for performance, if neither party performs, neither is in breach and their  
13          contractual obligations lapse.  
14

## 15 16       **SECTION IX.           TERMINATION OF CONTRACT**

17  
18       **A. In General.** A contract may terminate upon the completion of performance by all parties.  
19

20       **B. Mutual Agreement.** The parties to a contract may terminate the contract between them  
21       by mutual agreement for any reason.  
22

23       **C. Breach.** A contract may terminate upon a breach by one of the parties as set out in  
24       Section X of this Statute.  
25

## 26 27       **SECTION X.           BREACH OF CONTRACT**

28  
29       **A. In General.** A breach occurs when the promisor is under an absolute duty to perform;  
30       and this absolute duty of performance has not been discharged.  
31

32       **B. Effect of Breach.**  
33

1       **1.**       The effect of a breach depends on the materiality of it. To determine whether a  
2       breach is minor or material, the Tribal Court must look to the following factors.

3  
4           **a.**       the extent to which the non-breaching party will receive substantially the  
5       benefit he or she could have anticipated from full performance;

6  
7           **b.**       the extent to which the non-breaching party may be adequately  
8       compensated in damages;

9  
10          **c.**       the extent to which the breaching party has already performed or made  
11       preparations to perform;

12  
13          **d.**       the extent to which the breaching party will suffer hardship by termination  
14       of the contract;

15  
16          **e.**       the extent to which the breaching party acted negligently or willfully in his  
17       or her failing to perform; and

18  
19          **f.**       the extent to which the breaching party will perform the remainder of the  
20       contract.

21  
22       **2.       Minor Breach.** A breach is minor if the obligee gains the substantial benefit of  
23       his or her bargain despite the obligor's defective performance. Minor breaches may  
24       include, but are not limited to, delays in performance or small deficiencies in the quality  
25       or quantity of performance when precision is not critical. The non-breaching party a  
26       remedy, but will not relieve his or her duty of performance under the contract.

27  
28       **3.       Material Breach.** A breach is material if the obligee does not receive the  
29       substantial benefit of the bargain as a result of failure to perform or defective  
30       performance. The non-breaching party is discharged from his or her duty to perform and  
31       has an immediate right to all remedies.

32  
33       **4.       Minor Breach Coupled with Unwillingness to Perform.** When the breach is  
34       minor and coupled with an unwillingness to perform by the breaching party, the non-

breaching party may treat this as a material breach. The non-breaching party is discharged from his or her duty to perform and has a right to all remedies.

**5. Material Breach of Divisible Contract.** When the breach is material, but the breaching party has substantially performed a divisible part of the contract, the breaching party may recover for his or her substantial performance, but not under the whole contract.

## **SECTION XI. DEFENSES**

### **A. Defenses to Formation.**

**1. Lack of Mutual Assent.** If both parties entering into the contract are mistaken about existing facts relating to the agreement, the contract is voidable. The adversely affected party may void the contract if:

- a. the mistakes concerns a basic assumption on which the contract is made;
- b. the mistake has a material effect on the agreed-upon exchange; and
- c. the party seeking avoidance did not assume the risk of the mistake.

**2. Mistake in Transmission.** Where there is a mistake in the transmission of an offer or acceptance by an intermediary, the message as transmitted is operative unless the other party knew or should have known of the mistake.

**3. Ambiguity.** When a contract contains language that has at least two possible meanings, the following rules apply:

- a. **Neither Party Aware.** Where there is an ambiguity in the contract that neither party was aware of at the time of contracting, there is no contract unless both parties intended the same meaning.

1           **b. Both Parties Aware.** Where both of the parties were aware of the  
2           ambiguity at the time of contracting, there is no contract unless both parties in fact  
3           intended the same meaning.  
4

5           **c. One Party Aware.** Where one party was aware of the ambiguity and the  
6           other party was not at the time of contracting, a contract will be enforced  
7           according to the intention of the party who was unaware of the ambiguity.  
8

9           **4. Misrepresentation.** Where one party makes a false assertion intended to induce a  
10          party to enter into a contract, the contract is voidable if the innocent party justifiably  
11          relied on the fraudulent misrepresentation.  
12

13          **5. Lack of Consideration.** If the promises exchanged at the formation stage lack the  
14          elements of bargain or legal detriment, the contract is void.  
15

16          **6. Illegality.** If either the consideration or the subject matter of the contract is illegal  
17          under the Constitution or laws of the Little Traverse Bay Bands of Odawa Indians, the  
18          contract is void. However, a party may not invoke illegality as a defense if that party  
19          knew of the illegal nature of the consideration or subject matter of the contract.  
20

21   **B. Defenses Based on Lack of Capacity.**  
22

23          **1. Legal Incapacity to Contract.** If a person is legally incapable of incurring  
24          binding contractual obligations, timely assertion of this defense by a promisor makes the  
25          contract voidable at his or her election.  
26

27               **a. Contracts of Minors.** A contract entered into between a minor and an  
28               adult is voidable by the minor, but is binding on the adult.  
29

30                       **i.** The minor may choose to disaffirm a contract any time before, or  
31                       shortly after, reaching the age of 18. If the minor chooses to disaffirm, the  
32                       minor must return anything received under the contract that still remains at  
33                       the time of disaffirmance.  
34



1                    **ii.**      A minor may affirm the contract upon reaching the age of 18 either  
2                    expressly or by failing to disaffirm the contract within a reasonable time  
3                    after reaching the age of 18.  
4

5                    **iii.      Exception.** A minor is liable for the reasonable value of any  
6                    necessities furnished to him or her.  
7

8                    **b.      Mental Incapacity.** A person whose mental capacity is so deficient that  
9                    he or she is incapable of understanding the nature and significance of a contract  
10                   may disaffirm when lucid or by his or her legal representative.  
11

12                   **i.**          Such person may affirm the contract during a lucid interval or  
13                   upon complete recovery.  
14

15                   **ii.      Exception.** A mentally incompetent person is liable for the  
16                   reasonable value of any necessities furnished to him or her.  
17

18                   **c.      Intoxication.** The defense of intoxication is only available if the person is  
19                   so intoxicated that he or she does not understand the nature and significance of the  
20                   contract, and the other party knew or had reason to know of the intoxication.  
21

22                   **i.**          An intoxicated person may affirm the contract upon recovery.  
23

24                   **ii.      Exception.** An intoxicated person is liable for the reasonable value  
25                   of any necessities furnished to him or her.  
26

27                   **2.      Duress and Undue Influence.** Contracts induced by duress or undue influence  
28                   are voidable and may be rescinded as long as not affirmed.  
29

30                   **a.      Duress.** Duress occurs when:  
31

32                   **i.**          a party is physically forced to sign a contract against his or her  
33                   will; or  
34

1                   ii.       a party's assent to a contract is induced by an improper threat by  
2                   the other party that leaves the victim no reasonable alternative.  
3

4           **b.       Undue Influence.** Undue influence is unfair persuasion of a party who is  
5           under the domination of the person exercising the persuasion or who by virtue of  
6           the relationship between them is justified in assuming that the person will not act  
7           in a manner inconsistent with his or her welfare.  
8

9   **C.       Defenses to Enforcement.**  
10

11   **1.       Statute of Frauds.** If a contract falls within the statute of frauds, it must be  
12   evidenced by a writing containing material terms and signed by the parties sought to be  
13   bound. If the statute of frauds is not raised as a defense, it is waived. The following  
14   contracts fall within the statute of frauds.  
15

16           **a.**       A promise by an executor or administrator to pay the estate's debts out of  
17           his or her own personal funds must be evidenced by a writing.  
18

19           **b.**       Suretyship promises, i.e., a promise to pay the debt of another, must be  
20           evidenced by a writing. The promise must be to pay the debt of another upon  
21           default of that other person, and the promise must be made to the creditor.  
22

23           **c.**       A promise in consideration of marriage must be evidenced by a writing.  
24           The promise can be to do or refrain from doing something if the parties marry, or  
25           it may be a promise to induce marriage by offering something of value.  
26

27           **d.**       A promise creating an interest in land must be evidenced by a writing.  
28           Such promises include: the sale of real property; leases for more than one year;  
29           easements for more than one year; fixtures; minerals or structures to be severed  
30           by the buyer; and mortgages.  
31

32           **e.**       A promise that by its terms cannot be performed within one year from the  
33           date of the contract must be evidenced by a writing. However, the contract will

not come within the statute of frauds if it is possible to complete within one year, regardless of whether performance actually occurs within one year.

**f.** A contract for the sale of goods for a price of \$1,000.00 or more must, in general, be evidenced by a writing.

**2. Unconscionability.** The Court may refuse to enforce a provision or an entire contract to avoid unfair terms because of unfair surprise or unequal bargaining power.

**a.** Inconspicuous risk-shifting provisions such as the following are unconscionable: confession of judgment clauses; disclaimer of warranty provisions; and add-on clauses subjecting all of the property purchased from a seller to a repossession if a newly purchased item is not paid for.

**b.** A clause is unconscionable and unenforceable if the signer is unable to procure necessary goods from any other seller without agreeing to a similar provision, thus leaving the signer without a choice.

**c.** An exculpatory clause releasing a contracting party from liability for his own intentional wrongful acts is unconscionable.

## **SECTION XII. REMEDIES**

**A. Specific Performance.** If the monetary damages are inadequate, the non-breaching party may seek specific performance. Specific performance is an order by the Tribal Court ordering the breaching party to perform or face contempt charges. Specific performance should only be granted in cases where the subject matter of the contract is rare or unique, such that monetary damages will not put the non-breaching party in as good a position as performance would have because there is no available substitute.

**B. Compensatory Damages.** Compensatory damages should be granted for the purpose of putting the non-breaching party where he or she would have been had the promise been performed.

1  
2       **1.**       Expectation damages are those that reflect the expected benefit of the contract.  
3       Damages should be sufficient for the non-breaching party to purchase substitute  
4       performance.

5  
6       **2.**       Reliance damages are appropriate when the non-breaching party's damages are  
7       too speculative to measure. The non-breaching party may recover the cost of his or her  
8       performance, and are designed to put him or her in the same position as if the contract  
9       had never been formed.

10  
11       **3.**       Consequential damages consist of losses resulting from the breach that any  
12       reasonable person would have foreseen would occur from a breach at the time of entry  
13       into the contract.

14  
15       **4.       Certainty Requirement.** The non-breaching party has the burden to prove to the  
16       Tribal Court his or her damages to a reasonable certainty.

17  
18       **C.       Nominal Damages.** Nominal damages may be awarded where a breach is proven but no  
19       actual loss is proven.

20  
21       **D.       Liquidated Damages.** Parties to a contract may stipulate what damages are to be paid in  
22       the event of a breach. Such liquidated damages, or a liquidated damages clause, are enforceable  
23       by the Tribal Court only if in an amount that is reasonable in view of the actual or anticipated  
24       harm caused by the breach. To be enforceable, the non-breaching party must prove:

25  
26       **1.**       that damages for a contractual breach were difficult to estimate or ascertain at the  
27       time the contract was formed; and

28  
29       **2.**       that the amount agreed on was a reasonable forecast of compensatory damages in  
30       the case of breach.

31  
32       **E.       Contracts for the Sale of Land.** Damages must be measured by the difference between  
33       the contract price and the fair market value of the land.

1 **F. Employment Contracts.**

2  
3 **1. Breach by Employer.** The standard measure of damages is the full contract price,  
4 regardless of when the breach occurs, less any amount already paid under the contract.  
5

6 **2. Breach by Employee.** The employer is entitled to an amount equal to what it  
7 costs the employer to replace the employee.  
8

9 **G. Construction Contracts.**

10  
11 **1. Breach by Owner.**

12  
13 **a.** If the breach occurs before construction started, the builder is entitled to  
14 the profits he or she would have derived from the contract.  
15

16 **b.** If the breach occurs during construction, the builder is entitled to the  
17 profits he or she would have derived from the contract and any expenses incurred  
18 up until the date of breach.  
19

20 **c.** If the breach occurs after construction was completed, the builder is  
21 entitled to full contract price.  
22

23 **2. Breach by Builder.**

24  
25 **a.** If the breach occurs before construction, the owner is entitled to the cost  
26 above the contract price to complete the construction plus reasonable  
27 compensation for delay in performance.  
28

29 **b.** If the breach occurs during construction, the owner is entitled to the same  
30 as if the breach occurred before construction. However, if completion would  
31 involve economic waste, the measure of damages will be the difference between  
32 the value of what the owner would have received if the builder had properly  
33 performed and the value of what the owner actually received.  
34

1           c.       If the builder completes performance, but performance is late, the owner  
2           may recover damages for any loss incurred by not being able to use the property  
3           when performance was due.  
4

5 **H.     Restitution.** Restitution is available where one party has conferred a benefit on the other  
6 with the expectation of being compensated. The measure of restitution is measured by the benefit  
7 conferred in order to prevent unjust enrichment of the party receiving the benefit.  
8

9 **I.     Rescission.** The grounds for rescission must have occurred either before or at the time the  
10 contract was entered into. Such grounds include:  
11

- 12       1.       mutual mistake of a material fact ;
- 13
- 14       2.       unilateral mistake if the other party knew or should have known of the mistake;
- 15
- 16       3.       unilateral mistake if hardship by the mistaken party is so extreme it outweighs the  
17 other party's expectations under the contract;
- 18
- 19       4.       misrepresentation of fact or law by either party as to a material factor in the  
20 negotiations that was relied upon; and
- 21
- 22       5.       any other grounds including duress, undue influence, illegality, lack of capacity or  
23 failure of consideration.  
24

25 **J.     Reformation.** Where the written contract between the parties contains a clerical error or  
26 otherwise fails to reflect the actual intent of the parties, the Tribal Court may reform the contract  
27 so that it accurately reflects the intent of the parties.  
28

29 **K.     Mutual Agreement.** The parties to a contract are free to negotiate their own remedies  
30 before entering into the contract. Additionally, where there is a breach or termination of the  
31 contract the parties are free to negotiate appropriate remedies at the time of the breach or  
32 termination.  
33  
34

1 **SECTION XIII. THIRD PARTIES TO THE CONTRACT**

2  
3 **A. Third Party Beneficiaries.**

4  
5 **1. Categories of Third Party Beneficiaries.**

6  
7 **a.** Intended beneficiaries are third parties that have rights under a contract  
8 they are not a party to. A person is an intended beneficiary if he or she is  
9 expressly designated in the contract, performance is to be made directly to that  
10 person, or otherwise has rights under the contract.

11  
12 **i.** Creditor beneficiaries are intended beneficiaries where the  
13 promisee's purpose is to discharge an obligation owed to the creditor  
14 beneficiary.

15  
16 **ii.** Donee beneficiaries are intended beneficiaries where the purpose is  
17 to confer a gift on the donee beneficiary.

18  
19 **b.** Incidental beneficiaries are third parties that receive a benefit under a  
20 contract, but have no rights under the contract.

21  
22 **2. Vesting of Rights.** Intended beneficiaries may only enforce a contract when their  
23 rights have vested. The rights of intended beneficiaries vest when:

24  
25 **a.** manifests assent to the promise in a manner invited or requested by the  
26 parties;

27  
28 **b.** brings suit to enforce the promise; or

29  
30 **c.** materially changes position in justifiable reliance on the promise.

31  
32 **d. Exception.** An intended beneficiary may enforce a contract prior to his or  
33 her rights vesting when the promisee tells the beneficiary of the contract and

1 should foresee reliance by the beneficiary, and the beneficiary reasonably relies to  
2 his or her detriment.  
3

4 **B. Assignment of Rights under a Contract.**  
5

6 **1.** In general, all contractual rights may be assigned. However, an assignment is  
7 barred under the following circumstances:  
8

- 9 **a.** if the assignment would substantially change the obligor's duty;  
10  
11 **b.** if the assignment would substantially alter the obligor's risk;  
12  
13 **c.** if the assignment is prohibited by the laws of the Little Traverse Bay  
14 Bands of Odawa Indians or other law; or  
15  
16 **d.** if the contract contains an express provision that prohibits and makes void  
17 all assignments.  
18

19 **2.** The effect of an assignment is to establish privity of contract between the obligor  
20 and the assignee while extinguishing privity between the obligor and assignor. The  
21 assignee then replaces the assignor as the real party in interest, and that person alone is  
22 entitled to performance under the contract.  
23

24 **3.** Assignments need not be in writing unless the assignment is one of the following:  
25

- 26 **a.** assignment of wages;  
27  
28 **b.** assignments of interests in land; and  
29  
30 **c.** assignments intended as security interests under Article 9 of the Uniform  
31 Commercial Code, as adopted by the Tribe, and any similar law that may amend  
32 or replace it.  
33

34 **4.** Assignments for value are irrevocable. An assignment for value exists if it is



- a. done for consideration; or
- b. taken as security for or payment of a preexisting debt.

5. Gratuitous assignments are generally revocable. However, they become irrevocable if the obligor has already performed or grounds for estoppel exist. Such an assignment may be revoked in the following ways:

- a. death of the assignor;
- b. bankruptcy of the assignor;
- c. notice of revocation communicated by the assignor to either the assignee or the obligor;
- d. the assignor takes performance directly from the obligor; or
- e. subsequent assignment of the same right by the assignor to another person.

**6. Rights and Liabilities of the Parties.**

- a. The assignee may enforce his or her rights against the obligor directly, but may be subject to any defenses that the obligor had against the assignor. However, the obligor may not assert unrelated defenses against the assignee.
- b. The assignor impliedly warrants to an assignee for value that:
  - i. the assignor has the right to make the assignment;
  - ii. the right exists and is not subject to limitations or defenses other than those stated or apparent at the time of the assignment; and
  - iii. the assignor will do nothing to defeat or impair the assigned right.

1  
2 **C. Delegation of Duties under a Contract.**  
3

4 **1.** In general, all contractual duties may be delegated to a third person. However,  
5 duties may not be delegated under the following circumstances:  
6

- 7 **a.** where the duties involve personal judgment and skill;  
8  
9 **b.** where a special trust has been reposed in the delegator;  
10  
11 **c.** where the performance by the delegate will materially change the  
12 obligee's expectancy under the contract; or  
13  
14 **d.** where the contract restricts either party's rights to delegate duties.  
15

16 **2.** No formalities are required to have effective delegations, except that the delegator  
17 must manifest a present intention to make the delegation.  
18

19 **3. Rights and Liabilities of the Parties.**  
20

- 21 **a.** The obligee must accept performance from the delegate of all duties that  
22 may be delegated.  
23  
24 **b.** The delegator remains liable on the contract, even where the delegate  
25 expressly assumes the duties.  
26  
27 **c.** The delegate is not liable if there is a mere delegation. However, where  
28 the delegate assumes the duties of the delegator and the promise is supported by  
29 consideration, the delegate may be subject to liability together with the delegator.  
30

31 **D. Novation.** Novation substitutes a new party for an original party to the contract. It  
32 requires the assent of all parties and completely releases the original party.  
33  
34

1   **SECTION IX.           SAVINGS CLAUSE**

2  
3           In the event that any phrase, provision, part, paragraph, subsection or section of this  
4 statute is found by a court of competent jurisdiction to violate the Constitution, laws or  
5 ordinances of the Little Traverse Bay Bands of Odawa Indians, such phrase, provision, part,  
6 paragraph, subsection or section shall be considered to stand alone and to be deleted from this  
7 statute, the entirety of the balance of the statute to remain in full and binding force and effect.  
8  
9

10   **SECTION X.           EFFECTIVE DATE**

11  
12           Effective upon signature of the Executive or shall be deemed enacted if not expressly  
13 vetoed by the Executive within thirty (30) days of submission. The Tribal Council may, by an  
14 affirmative vote of seven (7) members of the Tribal Council, override a veto by the Executive.  
15  
16  
17

18                           **CERTIFICATION**  
19  
20